(1)

FILED

991103 DEC 30 1999

No. ~~OFFICE~~ OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

BEVERLY B. MANN,

Petitioner,

v.

THE CITY OF CHICAGO, a Municipal Corporation, JAMES D. MONTGOMERY, TIMOTHY D. O'HARA and JAYNE W. BARNARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Beverly B. Mann
Petitioner *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

67pp

QUESTIONS PRESENTED

1. Whether a federal circuit rule that permits the resolution of appeals by unpublished order may entitle an appellate court to avoid applying extensive pertinent settled law to arbitrarily selected cases, or whether, instead, a federal appellate court's use of that rule as a device by which to exempt some cases from application of the law actually creates two parallel bodies of law utterly independent of each other and thus violates the fundamental dictate of the Fifth Amendment's Due Process Clause.

2. Whether a federal appellate court must apply the doctrines of the law of the case and of waiver of claims and defenses as those doctrines are delineated in nearly 60 published opinions issued by that same appellate court within the last five years and by this Court in *Agostini v. Felton*, 521 U.S. 203 (1997), when a plaintiff asserts those doctrines in a successive appeal as having precluded defenses *after fourteen years of litigation*, or whether, instead, appellate-court application of those doctrines is merely optional as long as the appeal is resolved via unpublished (and mostly unexplained) order.

3. Whether, prompted by a belief that unpublished appellate resolution that deviates from universally established law is of no large importance because it does not actually alter the law, an *en banc* federal appellate court is entitled to promulgate an internal court policy that prohibits it from hearing, *en banc*, any appeal that was resolved by unpublished order – or whether, instead, such a policy *itself* fundamentally and impermissibly alters the law by effectively (albeit quietly) dismantling the Equal Protection component of the Fifth Amendment's Due Process Clause and perhaps the Due Process Clause itself.

4. Whether defendants in civil litigation waive affirmative defenses – in this case, the assertion of tort immunity by virtue of Illinois' local governmental and governmental-employee immunity statute, and the assertion of an innocent-construction defense to allegations of defamation – that they fail for nearly thirteen years to assert and then assert only in a summary judgment motion without first complying with Fed. R. Civ. P. 8(c), and whether the (unpublished) decision of the Court of Appeals for the Seventh Circuit to allow this practice conflicts with the published law of the Court of Appeals for the D.C. Circuit as stated in *Harris v. Secretary, U.S. Dept. of Veterans Affairs*, 126 F.3d 339 (D.C. Cir. 1997).

5. Whether a state's local governmental and governmental-employee tort immunity statute, when interpreted by the district and appellate courts to establish an irrebuttable presumption of *fact* concerning motive and other issues of state of mind of defendant government officials, violates the Fourteenth Amendment's Due Process Clause and the Seventh Amendment's right to jury determination – particularly when the statute *itself* is held to *require* a finding of *fact* that defamatory statements made by the officials were *accurate* or at least were made "*objectively,*" a finding that in this case contradicts the defendants' own admissions in trial and deposition testimony and the district court's oral comments as transcribed and included in the record.

6. Whether a federal court's decision to treat state common law counts that allege defamation and tortious interference with prospective economic as at-will wrongful employment-discharge counts, notwithstanding expressly contrary and uncontraverted authority of that state's highest court, constitutes a flagrant denial of the constitutional guarantees of due process of law and equal protection of the law.

7. Whether determination of the issues of motive and other state of mind of the defendants in a civil lawsuit can *ever* appropriately be determined by the court without reference to, and without consideration of, the evidentiary record, or whether, instead, a determination of *fact* by operation of *law* – in this instance, by operation of a governmental tort immunity statute – inherently constitutes a denial of due process of law and of the right to jury determination of fact in common law lawsuits.

8. Whether defendants in civil litigation are entitled to obtain *sequential, mutually exclusive sets of summary judgments*, and have them respectively affirmed in successive appeals, simply by parsing the conflicting defenses into separate summary judgment motions (and appeals) several years apart, first asserting one set of facts and then asserting the opposite, thus accomplishing in successive motions and appeals what they could not have accomplished in a single motion and a single appeal.

9. Whether the tactic described in Question 8, when allowed by an unpublished federal appellate order *that conflicts with explicit statements in four published opinions issued by that court the same year*, effectuates a denial to the plaintiff of due process of law and equal protection of the law in contravention of the Fifth Amendment.

10. Whether employment blacklisting by a local government via defamation of an individual within the community where she lives violates the Fourteenth Amend-ment's Due Process Clause (or whether, instead, the issue is unworthy of discussion by a federal court of appeals in affirming the dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of a count alleging such a violation.

11. Whether a complaint that alleges significant and knowingly inaccurate defamation and tortious interference with prospective economic advantage (including

specific acts of successful employment blacklisting of an attorney throughout a 20-month period) by the defendant officials of a local governmental entity, effectuated to advance the personal interests of those officials, fails to state a claim for violation of the Fourteenth Amendment's Due Process Clause, notwithstanding the following:

a. an explicit earlier appellate finding in the case that sufficient evidence exists to establish that the defendants acted with actual malice as that term is defined for those respective torts in *Mittelman v. Witous*, 135 Ill. 2d 220 (1989), and *Fellhauer v. City of Geneva*, 142 Ill. 2d 495 (1991);

b. a finding by the district court after 13 years of litigation (and affirmed by the appellate court in the unpublished order that prompts this Petition) that a section of the Illinois Local Governmental Tort Immunity Act, specifically 745 ILCS § 10/2-201, accords the defendants absolute immunity from state-tort liability for such actions;

c. this Court's opinion in *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), and footnote 4 in Justice Kennedy's concurrence;

d. This Court's opinion in *Albright v. Oliver*, 114 S. Ct. 807 (1994), and the concurrence of Justices Kennedy and Thomas;

e. this Court's opinion in *Milkovich v Lorain Journal*, 497 U.S. 1 (1990), which was based upon "society's pervasive and strong interest in preventing and redressing attacks upon reputation."

f. this Court's opinion in *Haddle v. Garrison,* 119 S. Ct. 489 (1998), which acknowledges that personnel decisions and defamatory statements by government officials may be effectuated purely to advance the personal interests of those officials;

12. Whether, once a defendant municipality and defendant municipal officials have asserted in memoranda to the court (and later in their appellate brief) that the officials

indeed were "serving in a position involving the determination of policy" and that the "act or omission" that caused the "injury" indeed occurred "from [their] act or omission *in determining policy*" – and once summary judgment has been entered in their favor on state-law tort counts upon a finding of state statutory tort immunity by virtue of that single asserted fact – the federal appellate court nonetheless was correct in treating the years-earlier dismissal of several corresponding civil rights counts as "unworthy of any discussion" (and, in fact, even of mention), notwithstanding the following opinions of this Court, five of them featured prominently in Petitioner's opening appellate brief:

St. Louis v. Praprotnick, 485 U.S. 112 (1988);
Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989);
County of Sacramento v. Lewis, 523 U.S. 833 (1998).
Albright v. Oliver, 114 S. Ct. 807 (1994), (and concurrence of Justices Kennedy and Thomas);
Parratt v. Taylor, 451 U.S. 527 (1981);
McMillian v. Monroe County, 520 U. S. 781 (1997);
Conn v. Gabbert, 119 S.Ct. 1292(1999);
Monterey v. *Del Monte Dunes*, 119 S.Ct. 1624 (1999).

13. Whether the "timeliness" requirement of Federal Rule of Civil Procedure 60(b) is met when the altered circumstances by which the Rule 60(b) motion is brought arise from the issuance of United States Supreme Court authority released two days before the motion is brought and six weeks after final summary judgment was entered in the litigation, and also from a reversal of a sudden recent position of fact as represented in written submissions to the court, and when the entry of the summary judgment itself constitutes new circumstances in light of the new Supreme Court authority.

14. Whether this Court's issuance of its opinions in *County of Sacramento v. Lewis, supra.*, and *Burlington Industries,*

Inc. v. Ellerth, 118 S.Ct. 2257 (1998), and *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S.Ct. 998 (1998), and constituted sufficiently new circumstances to require reconsideration of summary judgments and a Rule 12(b)(6)dismissal under the doctrine of the law of the case as this Court has defined it in *Agostini v. Felton, supra.*

15. Whether, when a federal circuit court repeatedly states a policy to certify questions to a state's highest court arising under state's law when the state's highest court has never addressed the question and the determination of it would determine the outcome of the case on appeal, that federal circuit court's failure to do so in a particular appeal violates the Fifth Amendment's Due Process Clause. (See *Yang v. City of Chicago*, Nos. 98-4238 and 98-4330, 7th Cir. Nov. 29, 1999; *Todd v. Societe BIC*, 9 F.3d 1216 (7th Cir. 1993).)

16. Whether defendants in a defamation lawsuit, and a federal appellate court, can circumvent this Court's holding in *Milkovich v. Loraine Journal*, 497 U.S. 1 (1990), simply by styling their First Amendment defense (for the first time nearly 13 years into the pendency of the lawsuit) as one of innocent construction rather than of opinion, particularly when the single case authority the court cites in support is one issued by the Illinois Supreme Court four years before the earlier remand for retrial of the court suddenly found to be protected by the innocent construction doctrine. (The appellate court's order in this case adopted an assertion by the defendant-appellees that a 1992 Illinois Supreme Court opinion, which based its ruling in favor of a defamation *plaintiff* expressly upon *Milkovich*, created a protection for defamatory speech that *Milkovich* itself specifically rejected as required by the First Amendment.)

17. Whether an appellate court's own characterization of the grounds for an innocent-construction defense regarding

defamatory statements as "obvious" precludes the initial assertion of the defense nearly one and one-half decades after the lawsuit was filed – the specific purported innocent construction which, incidentally, was enunciated neither by the court nor the defendants.

18. Whether a federal appellate court is entitled to declare in an unpublished resolution of an appeal that state-tort damages for defamation and tortious interference with prospective economic opportunity are limited to the damages available for breach of contract, notwith-standing extensive, unequivocal and unremittingly consistent state law to the contrary – law that that federal appellate court has acknowledged and applied in numerous appeals resolved by published opinion.

19. Whether, alternative to Question 16, a federal appellate court's (apparent) finding of fact, without reference to the evidentiary record, that in a particular case the plaintiff did not sustain tort damages for defamation and tortious interference with economic advantage in an amount in excess of that allowed by a breach-of-contract-damages measurement constitutes a violation of the plaintiff's Seventh Amendment right to a jury trial.

20. Whether, alternative to Questions 16 and 17, a federal appellate court's limitation of a plaintiff's allowable monetary recovery for defamation to a breach-of-contract measure of damages rather than the normal allowance of a tort measure of damages violates that plaintiff's rights to due process and equal protection of the law when the sole apparent basis for the court's unusual damages limitation was the plaintiff's financial need after eleven years of expensive litigation to have a small breach-of- Whether contract monetary award severed from the remainder of the lawsuit.

21. Whether judicial misconduct, including brazen undisclosed conflict of interest, is beyond the scope of 28 U.S.C. § 372(c) as mere "error," or whether, instead, the interpretation of that statutory subsection as precluding consideration of judicial misconduct complaints on the basis that such misconduct constitutes "error" effectively nullifies the statutory subsection; and whether the availability of appeal to the United States Supreme Court via a petition for writ of certiorari eviscerates the obligations of a circuit's chief judge (and the circuit's judicial conference) as delineated in the statute.

22. Whether judicial misconduct, including brazen conflict of interest, is mere "error" and thus is beyond the scope of 28 U.S.C. § 372(c)(3)(A), or whether, instead, the preclusion of consideration of judicial misconduct complaints on the basis that such misconduct constitutes "error" effectively nullifies that statutory subsection, and whether the availability of appeal to the United States Supreme Court via a petition for writ of certiorari eviscerates the obligations of a circuit's chief judge (and judicial conference) as delineated in the statute.

23. Whether both a primary and a secondary reason for its result, courts are required to apply the ruling in all cases in which the stated primary reason exists, irrespective of the existence of the secondary reason in the particular case at issue, and, if so, whether an appellate court's failure to do so upon a finding that the stated secondary reason does not apply in the case at issue constitutes a denial of due process and of equal protection of the law.

24. Whether Federal Rule of Appellate Procedure 28(j) does not apply during the pendency of petitions for rehearing with suggestion for rehearing *en banc*, as the court stated in two orders it issued in this case during the recent six-week pendency of such a petition (notwithstanding that court's acceptance last spring of three Rule 28(j)

submissions, by the Department of Justice and by the American Civil Liberties Union and the Legal Assistance Foundation of Chicago, in another appeal.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were as follows:

Appellant: Beverly B. Mann

Appellees: The City of Chicago, James D. Montgomery, Timothy D. O'Hara, Jayne W. Barnard

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings viii

Table of Contents ix

Table of Authorities xiv

Constitutional, Statutory and Procedural-Rule Provisions at Issue xxxv

Citations to Unpublished Orders 1

Jurisdiction 1

Statement of the Case 2

Reasons Why The Writ Should Be Granted 10

I. Fifth Amendment Due Process (and Equal Protection), and the Seventh Amendment Right to Jury Determination of Fact in Common Law Claims 10

A. The Distinction Between the Law of Employment-Related Defamation and Tortious Interference, on the One Hand, and the Law of Wrongful Discharge, on the Other 13

B. The Laundry List 15

C. The Doctrines of Law of the Case and Waiver 21

TABLE OF CONTENTS - Continued

D. The Distinction Between Damages for Tort and for Breach of Contract Under Illinois Law 24

E. The Parameters of First Amendment Protection for Defamation 26

II. Fourteenth Amendment Due Process and Equal Protection, and the Seventh Amendment Right to Jury Determination of Fact 27

Conclusion 29

INDEX TO SEPARATE APPENDIX

Appendices:

App. A: Notification Letter Re: Extension of Time Within Which to File Petition, United States Supreme Court, November 23, 1999 ..... A - 1

App. B: Seventh Circuit Order, September 3, 1999 ..... B - 1

App. C: Seventh Circuit Order, July 14, 1999 ..... C - 1

App. D: Seventh Circuit Order, January 19, 1996 .. D - 1

App. E: District Court Memorandum Opinion and Order, March 13, 1998 ..... E - 1

App. F: District Court Memorandum Opinion and Order, May 5, 1998 ..... F - 1

App. G: District Court Order, June 8, 1999 ..... G - 1

INDEX TO SEPARATE APPENDIX – Continued

App. H: District Court Memorandum Opinion, July 18, 1994 ..... H - 1

App. I: District Court Memorandum Opinion and Order, December 12, 1986..... I - 1

App. J: District Court Memorandum Opinion and Order, August 29, 1986..... J - 1

App. K: District Court Memorandum Opinion and Order, July 14, 1986..... K - 1

App. L: Notices of Appeal, April 6, 1998, May 28, 1998, July 1, 1998 ..... L - 1

App. M: Transcript of District Court Hearing, November 12, 1997 ..... M - 1

App. N: Transcript of District Court Hearing, March 31, 1998 ..... N - 1

App. O: Transcript of District Court Hearing, September 15, 1989 ..... O – 1

App. P. Orders stating that Rule 28(j) does not apply to such petitions, and denying leave to file supplemental authority, August 5, August 11, August 24, 1999..... P - 1

App. Q: Motion for Leave to Supplement Appendix To Petition for Rehearing en Banc With Transcript of Oral Argument, August 2, 1999; Transcript of Oral Argument, April 23, 1999; Order denying motion, August 6, 1999 ..... Q -1

INDEX TO SEPARATE APPENDIX – Continued

App. R: Judicial Misconduct Complaints, December 6, 1999, December 10, 1999; Orders dismissing judicial misconduct complaints, December 22, 1999; Petition to the judicial counsel for review of dismissal of judicial miscount complaints, December 27, 1999..... R -1

TABLE OF AUTHORITIES

Page

United States Supreme Court Opinions

Agostini v. Felton, 521 U.S. 203, 236 (1997) ..... i, vi, 21

Albright v. Oliver, 114 S. Ct. 807 (1994) ..... iv, v, 12, 28

Burlington Industries, Inc. v. Ellerth,
118 S.Ct. 2257 (1998) v

Conn v. Gabbert, 119 S.Ct. 1292 (1999) v

County of Sacramento v. Lewis,
118 S. Ct. 1708 (1998) ..... iv, v, 10, 12, 20, 28, 29

Fiore v. White, No. 98-942 (Nov. 30, 1999) 12

Haddle v. Garrison, 119 S. Ct. 489 (1998) ..... iv, 15

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) .... v, 18

McMillian v. Monroe County, 520 U. S. 781 (1997) v

Milkovich v. Lorain Journal,
497 U.S. 1 (1990) ..... iv, v, vi, 26

Monterey v. *Del Monte Dunes*,
119 S.Ct. 1624 (1999) v

Oncale v. Sundowner Offshore Servs., Inc.,
118 S.Ct. 998 (1998) vi

Parratt v. Taylor, 451 U.S. 527 (1981) .....v, 28

St. Louis v. Praprotnick, 485 U.S. 112 (1988) ..... v, 18

Teague v. Lane, 489 U.S. 288 (1989)..... 12

Federal Opinions

Avitia v. Metropolitan Club, 49 F.3d 1219
(7th Cir. 1995) 21, 23
Barrington Press, Inc. v. Morey, 816 F.2d 341
(7th Cir. 1987) 21

Benson v. S.I. Handling Systems, et al., 99-2700
(7th Cir. Aug. 12, 1999) 21

Britton v. Swift Transportation Co., 98-2492
(7th Cir. Aug. 8, 1999) 21

Brown & Williamson v. Jacobson, 827 F.2d 1119
(7th Cir. 1987) 26

Carr v. O'Leary, 167 F.3d 1124
(7th Cir. 1999) 21, 22, 23

DeSilva v. DiLeonardi, No. 99-1754
(7th Cir. Jun. 28, 1999) 19

Evans v. City of Chicago, 873 F.2d 1007
(7th Cir. 1989) 21

Harris v. Secretary, U.S. Dept. of Veterans Affairs,
126 F.3d 339 (D.C. Cir. 1997) ..... ii, 9

J.D. Edwards & Co. v. Podany, 168 F.3d 1020
(7th Cir. 1999) 23, 25

LaGuerre v. Reno (7th Cir. No. 98-1954) 24

Leavell v. Keiffer, No. 98-4089

(7th Cir. Aug. 19, 1999) 21

Neal v. Honeywell, Inc., Nos. 98-1728 and 98-3162
(7th Cir. Sept. 15, 1999 ..... 19, 20, 21, 25

TABLE OF AUTHORITIES - Continued

Nemmers v. USA, 870 F.2d 426 (7th Cir. 1989) 15, 21

Newman-Green Inc. v. Alfonzo-Larrain R.,
854 F.2d 916 (7th Cir. 1987) 23

Payne v. Churchich, 161 F.3d 1030 (7th Cir. 1998) 28

People Who Care v. Rockford Board of Education,
171 F.3d 1083 (7th Cir. 1999) 19, 21

Soderbeck v. Burnett County, Wis., 821 F.2d 446
(7th Cir. 1987) 21

Speakers of Sport, Inc. v. ProServ, Inc., 98-3113
(7th Cir. May 13, 1999) 23, 25

Todd v. Societe BIC, 9 F.3d 1216, 1221
(7th Cir. 1993) iv

U.S. v. Mobley, No. 99-1621 (7th Cir. Sept. 30, 1999) 29

Vidimos, Inc. v. Wysong Laser Co., Inc.,
No. 99-1159 7th Cir. Jun. 14, 1999) 21, 22, 23

Walker v. Nat'l Recovery, Inc., 99-2119
(7th Cir. Dec. 21, 1999)) 27

Wollin v. Gondert, No. 98-1857
(7th Cir. Sep. 2, 1999) 27

Yang v. City of Chicago, Nos. 98-4238 and
98-4330 (7th Cir. Nov. 29, 1999) ..... iv, 18

TABLE OF AUTHORITIES - Continued

Illinois Opinions

In re Chicago Flood Litigation, 176 Ill. 2d 179 (1997) 15, 18

Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358 (Ill. 1998) 25

Fellhauer v. City of Geneva, 568 N.E.2d 870, 142 Ill. 2d 495 (1991) ..... iv, 13, 14

Harinek v. 161 North Clark St. Ltd. Partnership, 692 N.E.2d 1177 (Ill. 1998) 27

Kolegas v. Heftel Broadcasting Corp., 154 Ill. 2d 1, 607 N.E.2d 201 (Ill. 1992) 26

Mittelman v. Witous, 552 N.E.2d 973, 135 Ill. 2d 220 (1989) ..... iv, 13, 14, 15

Stratman v. Brent, 683 N.E.2d 951 (Ill. App. 1997) 18, 29

Other Authorities

U. S. Const. Amend. V 10-27, 29-30

U. S. Const. Amend. XIV, § 1 27-30

U. S. Const. Amend. VII 10-30

U. S. Const. Amend. I 26

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES - Continued

42 U.S.C. § 1983 7

42 U.S.C. § 2000e *et seq*..... 7

745 ILCS 10/2-201 ..... *passim*

745 ILCS 10/2-107 9

745 ILCS 10/1-210 10-30

Fed. R. Civ. P. 8(c) 9

Fed. R. Civ. P. 60(b) 10

Seventh Circuit Rule 53 ..... *passim*

Seventh Circuit Rule 52 18

Illinois Supreme Court Rule 20(a) 20

28 U.S.C. § 372(c) .....xxxiii, 29

28 U.S.C. § 455 ..... 7, 8

F.R.A.P. 28(j) 24

Local Rule 12(n), Northern District of Illinois 16

CONSTITUTIONAL, STATUTORY AND PROCEDURAL-RULE PROVISIONS AT ISSUE

1. United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Constitution, Amendment XIV, § 1:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

4. United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5. Illinois Local Government and Government Employees Tort Immunity Act, 745 ILCS § 10/2-201:

Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 1992).

6. Illinois Local Government and Government Employees Tort Immunity Act, 745 ILCS § 10/2-107:

A local public entity is not liable for injury caused by any action of its employees that is libelous or slanderous.

7. Illinois Local Government and Government Employees Tort Immunity Act, 745 ILCS § 10/1-210 (1996):

"Willful and wanton conduct" as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.

8. Federal Rule of Civil Procedure 8(c):

(c) Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award,

assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

9. Seventh Circuit Rule 53. Plan for Publication of Opinions of the Seventh Circuit Promulgated Pursuant to Resolution of the Judicial Conference of the United States:

(c) *Guidelines for Method of Disposition.*

(1) *Published opinions.*

A published opinion will be filed when the decision

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law,

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

(2) *Unpublished orders.*

When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain

reasons for the judgment, but may not do so if the court has announced its decision and reasons from the bench. A statement of facts may be omitted from the order or may not be complete or detailed.

10. Seventh Circuit Rule 52. Certification of Questions of State Law:

(a) When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified. The certification will be made after the briefs are filed in this court. A motion for certification shall be included in the moving party's brief. (b) If the state court decides the certified issue, then within 21 days after the issuance of its opinion the parties must file in this court statements of their positions about what action this court should take to complete the resolution of the appeal.

11. Illinois Supreme Court Rule 20(a):

Certification. When it shall appear to the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit, that there are involved in any proceeding before it questions as to the law of this State, which may be determinative of said cause, and there are no controlling precedents in the decisions of this court, such court may certify questions of the laws of this State to this court for instructions concerning such questions of State law, which certificate this court, by written opinion, may answer.

12. Federal Rule of Civil Procedure 60. Relief From Judgment or Order. (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

13. 28 U.S.C. 372(c)

(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may

(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events. The chief judge shall transmit copies of his written order to the

complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly -

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph. A judge appointed to a special committee under this paragraph may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45 of this title. If a judge appointed to a committee under this paragraph dies, or retires from office under section 371(a) of this title, while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council -

(A) may conduct any additional investigation which it considers to be necessary;
(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;
(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;
(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;
(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;
(v) censuring or reprimanding such judge or magistrate by means of private communication;
(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or
(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge

appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title;

(C) may dismiss the complaint; and

(D) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7) (A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior may have engaged in conduct -

(i) which might constitute one or more grounds for impeachment under article II of the Constitution; or (ii) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8) (A) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(B) If a judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under paragraph (7), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

(9) (A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under

section 331 of this title, shall have full subpoena powers as provided in that section.

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that -

(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any such rule shall be made or amended only after

giving appropriate public notice and an opportunity for comment. Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this subsection may limit the period of time within which a person may file a complaint under this subsection.

(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

(14) Except as provided in paragraph (8), all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that -

(A) the judicial council of the circuit in its discretion releases a copy of a report of a special investigative committee under paragraph (5) to the complainant whose complaint initiated the investigation by that special committee and to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(C) such disclosure is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee estabiished under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

(16) Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph (6)(C), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.

(17) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(18) The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In

investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

14. 28 U.S.C. § 455. Disqualification of Justice, Judge, or Magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
(d) For the purposes of this section the following words or phrases shall have the meaning indicated:
(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
(2) the degree of relationship is calculated according to the civil law system;
(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:
(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the

outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

14. Federal Rule of Appellate Procedure 28(j):

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons

for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

CITATIONS TO UNPUBLISHED ORDERS

This lawsuit, which was filed on December 31, 1984, in the Federal District Court for the Northern District of Illinois, Eastern Division, has twice been before the United States Court of Appeals for the Seventh Circuit. Both sets of appeals were resolved by unpublished order, the first on January 19, 1996, the second on July 14, 1999. The January 19, 1996, order, which appears in this Petition at App. D, is recorded at 1996 U.S. App. LEXIS 1669 (Nos. 92-3761, 92-3797). The July 14, 1999, order, which appears at App. C, is recorded at 1999 U.S. App. LEXIS 16219 (Nos. 98-1936, 98-2413 and 98-2797). A Petition for Rehearing with Suggestion for Rehearing *En Banc* filed on July 21, 1999, was denied in an order issued on September 3, 1999, and appears at App. B. It is recorded at 1999 U.S. App. LEXIS 21411.

District court memorandum opinions are recorded at No. 84 C 11020 (May 5, 1998), appearing at App. F; 1998 U.S. Dist. LEXIS 3195 (Mar. 13, 1998, No. 84 C 11020), appearing at App. E; 1994 U.S. Dist. LEXIS 9893 (Jul. 18, 1994, 84 C 11020 N.D. Ill.), appearing at App. H; 1986 U.S. Dist. LEXIS 22829 (Jul. 14, 1986), appearing at App. K; 1986 U.S. Dist. LEXIS 20968 (Aug. 29, 1986), appearing at App. J; 1986 U.S. Dist. LEXIS 16517 (Dec. 12, 1986), appearing at App. I. A three-paragraph minute order issued on June 8, 1998, is recorded at 84 C 11020 and appears at App. G.

An earlier Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit was filed immediately following the resolution of the first set of appeals, and was denied in an order issued on October 7, 1996 (96-260).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On July 14, 1999, the Court of Appeals affirmed various District Court orders that entered summary judgment

in favor of Respondents and against Petitioner on several counts pursuant to Federal Rule of Civil Procedure 56, and affirmed an order that dismissed another count pursuant to Federal Rule of Civil Procedure 12(b). (See App. C; App. G; App. L.) Petitioner timely filed a Petition for Rehearing with Suggestion for Rehearing *en Banc*, which was denied in an order entered on September 3, 1999. (See App. B). This Court on November 23, 1999, granted Petitioner's application for an extension of time, to and including January 1, 2000, in which to file this Petition. (See App. A.)

STATEMENT OF THE CASE

This lawsuit, as indicated above, dates back to 1984. It arises from the political infighting among factions of the City of Chicago Democratic Party that began during the City's mayoral primary election campaign in early 1983.

Beverly Mann is an attorney who in 1979, shortly after receiving her law license, was hired at the behest of the City's mayor at the time, Jayne Byrne, as an assistant City corporation counsel. Mann was not a political activist, nor was any member of her family, but her father, a Chicago journalist, was a longtime colleague and friend of Byrne's husband, veteran Chicago Daily News City Hall reporter Jay McMullen.

Mann was assigned to the Law Department Torts Division. Her immediate supervisor was defendant Timothy O'Hara, who headed the Torts Division. As O'Hara testified, he had on several occasions before the spring of 1983 dissuaded Mann from resigning from the Law Department and, also on several occasions, had persuaded her to withdraw requests she had submitted to transfer to another division within the Law Department. One such incident occurred in January, 1983, in which he obtained a pay raise for her in exchange for her withdrawal of her resignation.

O'Hara in his testimony described Mann's job performance in each category and in various specific instances as "excellent," "better than average," and "great." He also testi-

fied that, by his standards, Mann had never lost a trial; she always had obtained either a "Not Guilty" verdict or a judgment in an amount less than the plaintiff's final pretrial demand. He admitted that he on numerous occasions in conversations with others in the office had praised Mann's competence and ability as an attorney. He added in his testimony that, in his opinion, Mann indeed was an able attorney and was competent in her job.

In February, 1983, Byrne was defeated for re-nomination by Harold Washington in the primary election after a particularly nasty three-candidate campaign. Mayor Washington was inaugurated in April, 1983. He immediately appointed defendant James Montgomery as City Corporation Counsel. Montgomery, in turn, hired defendant Jayne Barnard, the wife of a friend of his, as his chief deputy in charge of personnel matters.

Barnard began her job in August, 1983. That month, she devised a written job-performance evaluation system by which the Law Department division heads were to evaluate the job performance of their subordinate attorneys. O'Hara rated Mann as incompetent or barely competent in the "job duties" categories and also defamed her in the "personal characteristics" categories. In the space provided on the last page of the form for narrative comments, O'Hara began, "Attractive, very intelligent attorney."

When Mann strongly protested his numerical ratings of her, O'Hara laughed and told her they did not matter; Barnard, he said, had told the Division heads that this evaluation go-around was only a practice run and that "they won't be used for anything." The Division heads were to perform *real* evaluations six months later, he said Barnard had told them. Then, he said, Mann's evaluations would be "better." He also said, three times during their conference about the evaluations, "Beverly, I think you're very attractive." In another instance, he told her that she insulted him by talking with him only about her cases. He repeatedly told her that she had "no humility" and, in acknowledging this in his trial and deposition testimony, he said he thought Mann "should

be more humble."

There was no formal mechanism by which to protest the accuracy of the 1983 evaluations, but, at Mann's request, she met with Barnard and did protest the accuracy of O'Hara's evaluations of her. Barnard promised to speak with O'Hara about them and to apprise Mann of the result of the meeting. When three weeks later Mann had heard nothing further, she drafted a two-page letter of complaint and delivered it to Barnard's office.

Barnard testified that she never followed up on Mann's complaint and that she simply forwarded the evaluation to Montgomery for placement in Mann's personnel file. Barnard also acknowledged that she had received and read Mann's letter. She said she simply placed the letter into Mann's personnel file and did not show it to Montgomery.

In the fall of 1983, the City Counsel placed a hiring freeze upon the Law Department, yet Barnard was interviewing attorneys for prospective job openings. In early 1984, she began hiring attorneys and placing them in various Law Department divisions such as Traffic Court and Municipal Ordinance enforcement, considered undesirable, with the stated promise that their initial Division placement would be temporary; they would be transferred into the Torts Division or the Civil Rights Litigation Division as soon as openings were available so that they could get the trial experience they sought.

In February, 1984, Mann agreed to substitute for an office friend as trial counsel in a trial to begin that morning; the friend had arranged to take vacation time that week in order to address a personal matter, and the office had failed to inform the court. Mann read the plaintiff's deposition that morning for the first time while an assistant, also utterly unfamiliar with the case, participated in jury selection. Then the two of them, with Mann as lead counsel, won the trial against an attorney who had tried many cases against the City over a period of many years and had never before lost.

The second round of job performance evaluations occurred in July, 1984. This time, O'Hara defamed Mann only in the "Personal Characteristics" categories, rating her highly in the "job duties" categories. His narrative began, "Attorney is bright. A good legal mind."

At Mann's request, she met with Montgomery. She told him what she had earlier told Barnard orally and in writing, and provided further detail. She also told him about her October, 1983, meeting with, and letter to, Barnard. He said he was unaware of any of it. Mann handed him a five-page document she had drafted detailing her record of case results and summarizing her arguments in a sampling of them. He said he would read the document after the meeting.

Montgomery arranged a meeting with O'Hara and Mann. After only a few minutes, the meeting was interrupted by some emergency and ended abruptly. They scheduled another meeting for a few days later, but that meeting was cancelled and not rescheduled. Three weeks later, on September 4, 1984, Barnard told Mann she had been fired; Barnard did not know the reason, she said. But without Montgomery's knowledge, Barnard placed an "Exit Interview Report" form in Mann's personnel file stating that Mann was "involuntary terminated" for "inadequate performance of duties."

Montgomery testified that he discharged Mann because of the two sets of performance evaluations. He described Mann as "intelligent" and "articulate" but characterized her statements to him about O'Hara as "bitching." Asked whether he had inquired into whether Mann "had good reason to bitch," he said he had not; he "already knew she had good reason to bitch," he said, because he knew O'Hara's evaluations were not accurate. He also testified that he had read the five-page document Mann had handed him when they met, and that he thought it reflected excellent results.

Montgomery also testified that he pressured at least one Law Department division head to provide a poor job performance evaluation for a particular attorney in order to

provide a basis upon which to discharge the attorney. Both he and Barnard admitted that they needed openings in the Torts Division. And Montgomery acknowledged that he was quoted accurately as follows in an article published in the Chicago Tribune in early 1986 shortly after he resigned as corporation counsel:

> You engage people who are known to you, whose confidence is known to you. I don't know that it would really be a wise thing for any politician to hire people who are not in any way aligned politically to him. That would be suicide.

After Mann was told she was discharged, she immediately retained counsel, who, upon threat of a lawsuit, negotiated a settlement. Mann did not request and did not receive any financial payment; she received only an agreement that Montgomery himself would respond to all inquiries about Mann from prospective employers and would limit his comments to statements contained in a draft reference letter to be signed by him. The agreement called for Mann to draft the letter, but when she did not produce the letter by the following week, Barnard drafted one and had it delivered to her attorneys' office. The letter praised Mann highly. Barnard testified that its contents were "factually" accurate.

Mann, for her part, agreed *only* that she would not file a lawsuit as long as the defendants complied with the agreement's terms; the contract included no waiver of tort damages if the defendants breached the agreement and defamed her or tortiously interfered with her prospective economic advantage. Mann paid her lawyers more than $3,500 to negotiate the non-financial agreement.

Montgomery testified that he never complied with the agreement; he simply had the phone inquiries referred to Barnard. In response to an inquiry from an attorney at the office United States Trustee in Bankruptcy in Chicago, where Mann had been offered a job pending a reference check and FBI background check, Barnard said there was an agreement between Mann and the City that prohibited Barnard from

discussing Mann with him but that "sometimes silence speaks a mouthful." The job offer was rescinded. Barnard in her testimony characterized the statement as "indiscreet." The attorney to whom she made the comment testified that the comment shocked him. The head of the Justice Department's Bankruptcy Division testified that the comment cost Mann the job.

Mann resumed her job search, eventually mailing more than 200 resumes and interviewing with 44 prospective employers. She was tentatively offered several jobs, but each time the offer was rescinded in a perfunctory phone call or letter. After 20 months, she ended her search. For a year beginning in January, 1988, she practiced law solo, working from her home. She has not practiced law since then.

Mann filed this lawsuit in the wake of the "silence speaks a mouthful" incident. The lawsuit, brought largely by virtue of 42 U.S.C. § 1983, alleged violation of the First Amendment right to free association, violation of the Fourteenth Amendment's right to substantive due process of law, violation of the Fourteenth Amendments' right to equal protection of the law, violation of 42 U.S.C. § 2000e *et seq.*, common law defamation, common law tortious interference with prospective economic advantage, and breach of severance agreement.

The case was assigned to District Judge James B. Moran, who repeatedly, including twice in Mann's presence, instructed the defendants' counsel to file a dispositive motion. Mann each time responded by filing a more detailed amended complaint, ultimately a 48-page one with 16 exhibits. The judge then issued the series of 1986 memorandum orders identified above. (See Apps. K, J and I.) Those orders, which dismissed several counts but not the entire complaint, state that employment blacklisting by government officials does not constitute a violation of the Fourteenth Amendment and that Mann's detailed complaint and exhibits failed to establish pretext or defamatory inaccuracy by the defendants.

Two years later, that judge recused himself when Mann learned that he and defendant Barnard, through a series of marriages and divorces, shared four stepchildren who lived with the judge and his wife, and that Barnard and the judge saw each other regularly at family social events. (Barnard's husband and the judge had been neighbors a decade earlier and had swapped spouses. Each of the original couples had four children. Barnard married her husband in 1983 after he and the judge's first wife divorced.)

The case then was assigned to a judge who stated that the case was an inappropriate one for summary judgment because it was replete with factual controversies. (See App. O.) Shortly afterward, it was reassigned again, to a newly confirmed judge.

The procedural history thereafter is reflected in the unpublished orders cited above. In essence, though, summary judgments were entered on August 13, 1991, on all civil rights counts triable to a jury that were not dismissed in the 1986 memorandum orders. (See App. H.)[1] Of particular significance to the issues presented in this Petition's section pertaining to the Fourteen Amendment (pp. 27-29), summary judgment also was entered in favor of the City of Chicago on the defamation count by virtue of immunity conferred by 745 ILCS 10/2-107, quoted above. That statutory subsection reads, "A local public entity is not liable for injury caused by any action of its employees that is libelous or slanderous."

The common-law defamation, tortious interference and breach of severance agreement counts against defendants O'Hara, Barnard and Montgomery were tried to a jury in the fall of 1991. The jury awarded Mann approximately $72,000 on her tortious interference count and approximately $68,000 on her breach of severance agreement count. They resolved the defamation count in favor of the defendants.

---

[1] The August 13, 1991, order provided no explanation for the summary judgments. Before briefing in the first set of appeals, a motions panel remanded the case for explanation, the result of which appears at App. H.

On cross-appeal, the summary judgments and the Rule 12(b)(6) dismissal of the due process count were affirmed without comment. The defamation and tortious interference counts were remanded for retrial upon a finding of inappropriate instruction to the jury concerning the definition of the term "actual malice" as Illinois law defines it for the respective torts. The breach of severance agreement verdict was affirmed. (See App. D.)

The defendants had argued, extensively, in the cross-appeals that there was insufficient evidence to support a jury finding of actual malice as the Illinois Supreme Court has defined the term for the respective torts. The appellate court in remanding the counts for retrial rejected the argument with respect to both of the counts.

Nonetheless, in July, 1997, twelve and one-half years after the case was filed and 18 months after remand for retrial on the defamation and tortious interference counts, the defendants filed another summary judgment motion. *The motion reasserted virtually every argument in their pre-appeal summary judgment motion and in their briefs on appeal,* including a claim that the jury award on the breach-of-severance-agreement claim is duplicative of recovery in tort. It also for the first time asserted additional affirmative defenses that were available, if at all, all along. The defendants had not obtained leave, as per Fed. R. Civ. P. 8(c), to assert the defenses. See *Harris v. Secretary, U.S. Dept. of Veterans Affairs*, 126 F.3d 339 (D.C. Cir. 1997).

The summary judgment motion nevertheless was granted on both remanded counts. Mann moved for reconsideration, not only of those summary judgments but also of the ones entered in 1992 in light of newly issued authority of this Court and in light of a reversal of a key position of fact by the defendants: In written argument in support of their recent summary judgment motion, they admitted that their conduct indeed occurred in determining governmental policy – an admission necessary to their claim of statutory tort immunity but also an admission that reversed their earlier assertion of fact upon which they had obtained the summary judgments

entered on three civil rights counts in August, 1991. The district court on May 5, 1998, issued a memorandum opinion and order denying Mann's motion.

The July 14, 1999, unpublished order of the appellate court affirmed all of the summary judgments, most of them without comment. That order also affirmed without comment a minute order entered on June 8, 1998, that denied a motion brought by Mann pursuant to Federal Rule of Civil Procedure 60(b) for reconsideration of the 1986 dismissal of her substantive Due Process count. She had filed the motion on May 28, 1998, in light of *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), issued two days earlier, and in light of the district court's March 13, 1998, finding in this case that Illinois' Local Governmental and Governmental Employees Tort Immunity Act accords the defendants absolute immunity for the state-law torts alleged. The June 8, 1998, minute order stated only that the Rule 60(b) motion was untimely filed; it did not address the merits of the Due Process claim. (See App. K.)

The July 14, 1999, order also *directly* reaffirmed, without explanation, the 1986 dismissal of the Due Process count; on May 28, 1998, less than 30 days after the district court denied her motion for reconsideration of the March 13, 1998, summary judgments, Mann had filed an additional notice of appeal to enable her to again appeal *directly* from the 1986 dismissal of that count in light of *County of Sacramento* and the new circumstance in her case. (See App. L.)

REASONS WHY THE WRIT SHOULD BE GRANTED

I. FIFTH AMENDMENT DUE PROCESS (AND EQUAL PROTECTION), AND THE SEVENTH AMENDMENT RIGHT TO JURY DETERMINATION OF FACT IN COMMON LAW CLAIMS

This Petition asks this Court to elevate the recognized legal significance of conflicts between a single circuit's published and unpublished law to the status accorded conflicts

in the published law among the various circuits, particularly when the device of unpublished order has enabled the deliberate failure by the court to apply settled published law in a particular case. Certainly as a practical matter, the importance of the former is no less than that of the latter, and, in a significant respect, it actually is greater. In Mann's case, she *relied upon* the published law of her circuit and of her state, and upon the supposed constitutional guarantees of due process and equal protection of that published law, and has paid dearly for it.

Phrased differently, the seminal issue is whether due process and equal protection of the law are, after all, guarantees or are instead mere suggestions to be accepted or rejected by appellate courts as they please. The issue concerns the very meaning of law itself. A divergence between the published and unpublished law of a single circuit is as much a denial of due process of law and its equal protection component as is a conflict of law among the circuits.

Mann asks this Court to state a rule of law that is simple in both concept and application: If the particular appeal would have been resolved differently had the court been required to publish the result and the pertinent substantive facts or procedural history, that resolution of the appeal unconstitutionally denies due process and equal protection of the law. Absent such a rule of law, the appellate rules permitting the secret, private court resolution of appeals create a legal loophole that breaches the promise of due process and equal protection, a loophole for the courts that, unlike others, cannot even be discerned from reading the published law.

This Court has said so often, e.g., in *Albright v. Oliver*, 114 S. Ct. 807 (1994); *County of Sacramento v. Lewis*, *supra.*, that the essence of the constitutional guarantee of due process of law is the circumscription of the arbitrary exercise of the powers of government against the individual. This Petition presents the civil-law equivalent of the issues this Court is hearing this term in *Fiore v. White*, No. 98-942 (intermediate opinion issued Nov. 30, 1999). See, also, *Teague v. Lane*, 489 U.S. 288 (1989).

The decision by an appellate panel to resolve a particular appeal by unpublished order is, as this case demonstrates, utterly arbitrary, notwithstanding the guidelines stated in the circuit rule permitting unpublished appellate resolution, thus the failure to apply settled law to a particular case by virtue of that device is, in turn, utterly arbitrary.

The order issued in Mann's appeals, although short, is replete with neon signs advertising the court's unabashed ignorance of the specifics of this lawsuit and the arguments presented in the appeal. One sign is the order's erroneous characterization of the operative complaint as alleging willful and wanton misconduct rather than deliberate misconduct. Another is the erroneous statement that that court's order resolving the initial set of appeals had discussed the evidentiary record in the case. Another is the order's *two* references to key defendant Jayne Barnard as "he." And another is the order's erroneous statement that Mann did not allege the publication of statements not found in her personnel file; the sentence, "Sometimes silence speaks a mouthful," appeared nowhere in Mann's personnel file.

Most startling, the order suggests that the court did not even know *the chronology of the earlier set of appeals in relation to the trial in the case and the filing and resolution of the earlier summary judgment motion* – the one filed and resolved *before* the first set of appeals.

Two of the panel members passed through *two* appeals in her case so utterly disengaged from the facts and allegations in it that they did not even know the gender of a key defendant. The contents of the order, other than its bottom line, didn't concern them. Had the order referred to Mann as a monkey, they would have signed onto that, too.

Mann was entitled to genuine appellate review but, courtesy of that court's Rule 53(c), received instead a sort of parody of it. Worse, the reason for the *faux* appellate review in her appeals appears to have been more an invidious one than a purely arbitrary one: She appeared before that court as a civil appellant *pro se*. The secret, anonymous nature of unpublished *per curium* orders removed any consequence to the

reputations of the panel members from the contents of the order and any consequence to *stare decisis*; no one important would know of it and *stare decisis* would not change, thus the panel was free to engage in a wholesale disregard of settled law, and that is what it did.

The effect is dramatic. In Mann's case, the list of pertinent settled law – federal and state, procedural and substantive – that the court so easily ignored is remarkably extensive. It is recited below.

A. THE DISTINCTION BETWEEN THE LAW OF EMPLOYMENT-RELATED DEFAMATION AND TORTIOUS INTERFERENCE, ON THE ONE HAND, AND THE LAW OF WRONGFUL DISCHARGE, ON THE OTHER.

In its January 19, 1996, remand order, the appellate court had relied largely upon two Illinois Supreme Court opinions, *Mittelman v. Witous,* 552 N.E.2d 973, 135 Ill. 2d 220 (1989), and *Fellhauer v. City of Geneva*, 568 N.E.2d 870, 142 Ill. 2d 495 (1991), as had the district court in denying summary judgment on the defamation and tortious interference counts. *Mittelman* and *Fellhauer* define the term "actual malice" as it pertains respectively to defamation and tortious interference counts brought under Illinois law. For defamation, it is knowledge that the statement is false or a reckless disregard for its truth. For tortious interference, it is intent to harm or knowledge that the conduct is wrongful. It is, then, wrongful *intent*.

The defendants in Mann's case had argued both in their response to Mann's appeal on the defamation count and in support of their own appeal on the tortious inference count – as had the defendants in *Mittelman* and *Fellhauer* – that employment defamation and tortious interference allegations really were at-will employment wrongful discharge allegations and should be analyzed as such. The Illinois Supreme Court and, in turn, the appellate court earlier in Mann's case, *rejected* that argument. *Mittelman* states:

> It is certainly not in the best interest of the corporation to receive false information regarding one of its employees, even if that employee is ultimately responsible for a major corporate loss; nor is it in the best interest of the corporation for one who is responsible for such a loss to vindicate himself by unjustly imputing fault to another.[2] If Witous failed to act in the corporate interest, he cannot reasonably claim that he acted on behalf of the corporation. *Thus, he and the corporation are not one and the same for purposes of tortious interference analysis.* [Emphasis added.]
>
> Moreover, given the allegations of Mittelman's complaint, Witous employed "wrongful means" in dealing with the corporation and Mittelman. The defamation and tortious interference counts are analytically intertwined in our view. *Defamatory statements may, in themselves, give rise to a cause of action for libel or slander and, at the same time, become the means by which the tortious interference with contractual relationships or prospective economic advantage is committed....* If Witous slandered Mittelman, and ultimately cost Mittelman his job, as Mittelman alleges in his per quod count, that independent wrong constituted "wrongful means" within the meaning of the Restatement and, if Witous is found to have possessed the requisite intent... he improperly interfered with Mittelman's prospective business relationship. [Emphasis added.]

---

[2] The portion of this sentence that appears before the comma originated *verbatim* with Mann. Mann was aware in the fall of 1988 that the Illinois Supreme Court had agreed to hear the case and that the resulting opinion would profoundly effect the law pertinent to her own lawsuit. She contacted Robert Mittelman, an attorney handling the appeal *pro se*, and offered her assistance in developing the arguments for his brief.

It was Mann who devised the argument summed up by the last sentence of that paragraph, the sentence that reads, "Thus, [the defendant supervisor] and the corporation are not one and the same for purposes of tortious interference analysis," and it was she who wrote the sentence, "It is certainly not in the best interest of the corporation to receive false information regarding one of its employees," adopted by the court *verbatim* from the brief.

This Court in *Haddle v. Garrison*, 119 S. Ct. 489 (1998), noted the distinction between the law of employment-related defamation and tortious interference, on the one hand, and the law of wrongful discharge, on the other. Illinois' law provides no exception to that rule of law.

B. THE LAUNDRY LIST

One newly raised defense was a section of Illinois' Local Government and Government Employees Tort Immunity Act, 745 ILCS § 10/2-201. That statutory subsection, enacted decades earlier, had not been amended since the inception of this lawsuit, but the defendants argued that an Illinois Supreme Court opinion issued in February, 1997, *In re Chicago Flood Litigation*, 176 Ill. 2d 179 (1997), interpreted § 10/2-201 as barring recovery in tort for willful and wanton misconduct.

The district judge in granting the summary judgments upon that defense acknowledged that the defense was available earlier but said he was allowing it anyway because the Illinois Supreme Court had only just found the statutory subsection applicable to willful and wanton misconduct. (See App. E.) The memorandum opinion also said:

> *Plaintiff is correct that the evidence cited by Defendants on remand is not substantially different from the facts already decided in this case. Nemmers*, 870 F.2d at 428.... Because we have granted the motion for summary judgment *due to the change in Illinois law*, Plaintiff need not submit a [Local Rule 12(n) statement submitting fact evidence in response to the summary judgment motion].

When in her motion for reconsideration, Mann noted that her allegations were not of willful and wanton misconduct but of deliberate injury, the judge ruled, notwithstanding the absence of any Illinois opinion so holding, that the statute applied to deliberately injurious conduct, as well.

When, in that motion, Mann quoted from Illinois Supreme Court authority issued three weeks before the entry of the summary judgments in Mann's case (of which the judge had been immediately apprised), stating expressly that a prerequisite to immunity under the statutory subsection was a finding that the injury at issue had occurred from "an act or omission in determining policy," and that the defendants earlier had obtained summary judgment and appellate affirmance on civil rights counts upon their assertion that their conduct did *not* arise from government policy, the judge, without explanation or reference to the evidentiary record, suddenly found that the defendants *had decided to "objectively evaluate Mann's performance"* and that the defendants were employees whose positions involved either making policy or making discretionary decisions, thus statutory subsection conferred immunity upon their conduct.

The judge found no factual inquiry necessary and certainly did not conduct one; the issues of fact, he found, were to be determined instead by operation of 745 ILCS § 10/2-201. No need, he found, for consideration of the evidentiary record developed during years of discovery conducted in the litigation, which by then had cost Mann more than $180,000 – much of it in borrowed money, much of it the proceeds of sales of blue-chip securities that had been in her family for three generations until they were sold in the late 1980s to pay her several-thousand-dollar-a-month legal fees at the time.

No, it was the Tort Immunity Act that, after all, determined what had been the seminal issue of fact in the case since it was filed in 1984; i.e., the defendants' motive(s) for their conduct, the court said. The defendants had decided to objectively evaluate Mann's job performance; the immunity statute *required* this finding of fact, the district judge said and so did the appellate court, which parroted the district judge's statement *verbatim* without elaboration.

On appeal, Mann asserted the implausibility of, and utter lack of foundation for, an interpretation of the statute as creating an irrebuttable presumption of *fact* concerning the

motive of the defendants, and argued that such an interpretation in any event renders the application constitutionally impermissible. But the appellate court found these arguments items on "a laundry list unworthy of any discussion" and, without prefatory explanation, stated as its final paragraph that it was affirming the summary judgments "[s]ince the defendants' decisions to objectively evaluate Mann's performance were made by employees whose positions involved either making policy or making discretionary decisions, and the acts or omissions by the defendants were both discretionary and involved in policy making decisions ..."

"In her most recent appeal," the court's order reads, "Mann raises a laundry list of issues; however, the only one worthy of any discussion is whether the defendants actions are shielded from liability under the Illinois Tort Immunity Act." This patronization, intended to imply that the lawsuit itself was frivolous and that Mann had quite some nerve in bothering the court with it a second time, failed to note that the earlier appeals were not just Mann's but also were the defendants, and that the defendants *lost* on *their* arguments that Mann's defamation and tortious interference counts failed to state a claim and that, in any event, her claim was not supported by the evidentiary record. The panel used this expedient to falsely imply its knowledge of the contents of the briefs.

The appellees in Mann's case had waited twelve and one-half years to raise a statutory immunity defense that one of them, the City of Chicago, routinely asserts as a defense in tort cases and had asserted from the beginning more than five years earlier in the *In re Chicago Flood Litigation* case. *No Illinois opinion had ever held the statute applicable to the types of torts Mann was alleging*, and the only opinion to even address the issue, *Stratman v. Brent*, 683 N.E.2d 951 (Ill. Ct. App. 1997), had held that it did not (discussed below). The defendants were basing their motion on a reversal of a position upon which they had obtained earlier summary judgments. Yet Mann shouldn't have bothered the appellate court with her appeal. Not as a *pro se*, anyway.

On November 16, 1999, Mann filed a motion to recall the mandate and for clarification of the court's enigmatic order. On November 29, 1999, the day that Mann's motion to recall the mandate was denied, the court certified a question to the Illinois Supreme Court pertaining to interpretation of a section of the Illinois Tort Immunity Act. See *Yang v. City of Chicago*, Nos. 98-4238 and 98-4330 (7th Cir. 1999). Mann had requested in her petition for rehearing that the court do that in her case. Judge William Bauer, a panel member in Mann's appeals, authored *Yang*, in which Judge Frank Easterbrook, the presiding panel member in Mann's appeals, concurred. That opinion quotes Circuit Rule 52 and Illinois Supreme Court Rule 20(a), each quoted above.

In her petition for rehearing. Mann also had argued to the district court that the defendants earlier had obtained summary judgments and appellate affirmance of those summary judgments in Mann's civil rights counts partly upon their assertion that the conduct at issue did *not* constitute government policy and was committed in the determination of government policy. The defendants were bound by their statement or, alternatively, the summary judgments entered upon the basis of that statement must be reversed.

But the district judge found that the "standard," as he called it, for determining government policy under state law differs from that under federal civil rights law. He did not address *St. Louis v. Praprotnick*, 485 U.S. 112 (1988), and *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989), although Mann referenced those opinions extensively.

On appeal, Mann emphasized the issue. The title of a section of her opening appellate brief read, "Parties are Not Entitled to Make *Sequential* Assertions of Fact and Law that *Directly Contradict* One Another, When the Earlier Assertions Supported Earlier Rulings or Findings of Fact that Resolved Substantive Issues." [Emphasis in original.]

But the court found this another item on the laundry list unworthy of its discussion, this although 16 days earlier, Judges Easterbrook and Bauer had specifically *disallowed* inconsistent positions argued sequentially in successive

appeals. Then Judge Easterbrook, writing for the court, said, "*Too late. Petitioners could choose one side of the required/forbidden line, and they might have been entitled to argue inconsistent positions simultaneously, but they can't present them in sequence.*" [Emphasis added.] See *DeSilva v. DiLeonardi*, No. 99-1754 (7th Cir. Jun. 28, 1999). See, also, *People Who Care v. Rockford Board of Education*, 171 F.3d 1083 (7th Cir. 1999), in which Judge Bauer, a panel member in *both* sets of appeals in Mann's case, concurred.

Two days after the mandate was issued in Mann's appeals, Judge Easterbrook, writing in *Neal v. Honeywell, Inc.*, Nos. 98-1728 and 98-3162 (7th Cir. Sept. 15, 1999), for a panel that included Judge Kenneth Ripple, the third panel member in Mann's appeals, said:

> [Appellant] *Honeywell's current position contradicts the premise of its interlocutory appeal in 1994 and would make that interlocutory review superfluous. This is something in which the judicial system is vitally interested even if [appellee] Neal no longer cares. Her failure to stand on a procedural objection therefore is not dispositive. Sometimes the judiciary must act in self-defense. ... By seeking permission to appeal under sec. 1292(b), therefore, Honeywell was representing that these conditions were satisfied... After receiving permission to take such an appeal and losing, a party cannot contend that the answer is irrelevant.* If Honeywell is right now, then it was wrong to appeal in 1994..... *To persuade us to hear the interlocutory appeal, Honeywell told us that the case turned on the difference between the five- and six-year periods. We picked six, which resolves the limitations dispute.* [Emphasis added.]

Neal was argued on May 17, 1999, three weeks after Mann's appeals were argued. In Mann's case, though, the court relegated the first set of appeals to the status of a mere practice run regarding the defendants' (but not Mann's) arguments.

Other items on the laundry list that the court deemed unworthy of its discussion: the application of the doctrines of the law of the case and waiver to this fourteen-year-long lawsuit after first trial, after earlier summary judgments, after earlier appeal; the propriety of mutually exclusive summary judgments entered at different times upon respectively conflicting assertions of fact; the substantive due process claim as per *County of Sacramento*, *supra.*; the propriety under Illinois law of treating employment defamation and tortious interference as at-will employment wrongful discharge counts; the inapplicability of 745 ILCS § 10/2-201 to deliberately injurious (or bad faith) conduct; the inapplicability of 745 ILCS § 10/2-201 to activities not unique to government entities, as per extensive Illinois common law.

The district judge repeatedly and insistently had pressured Mann to accept a small settlement offer because of the age of the litigation and because, he said, she was spending too much time on it; she should be using her "talent" as a "bright, capable person" to practice law on behalf of clients who would pay her, he said. See Apps. M and N; e.g.:

> This is dogging your life. You know, I could see maybe suing the City, but you have a life besides that. I mean, come on. We spent some time together. Why are you letting your talent sit aside? You know, really somebody -- at some point someone has got to say this to you." (See transcript at App. M.)

At another hearing, he said he thinks about Mann's case when he is driving in his car. His conclusion: She should accept whatever was offered in settlement so that she could spend her time doing other things. And at a hearing shortly after he entered the summary judgments but before he ruled on Mann's motion for reconsideration, he again pressured her to accept whatever settlement offer was made. (See App. N.)

That judge predicted accurately that as a *pro se* appellant in a civil lawsuit, Mann would receive only rubber-stamp appellate review of his rulings, so he did what suited his convenience. There is an inverse correlation between the likelihood of genuine appellate review and the need for it.

C. THE DOCTRINES OF LAW OF THE CASE AND WAIVER

Mann's research has disclosed nearly 60 opinions of that court published with the last five years that recite with unremitting consistency the doctrines of law of the case and waiver. See, e.g.; *Vidimos, Inc. v. Wysong Laser Co., Inc.*, No. 99-1159 (7th Cir. Jun. 14, 1999); *Benson v. S.I. Handling Systems, et al.*, 99-2700 (7th Cir. Aug. 12, 1999); *Avitia v. Metropolitan Club*, 49 F.3d 1219 (7th Cir. 1995); *People Who Care v. Rockford Board of Education*, 171 F.3d 1083 (7th Cir. 1999); *Neal v. Honeywell, Inc., supra.*; *Britton v. Swift Transportation Co.*, 98-2492 (7th Cir. Aug. 8, 1999); *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999); *Leavell v. Keiffer*, No. 98-4089 (7th Cir. Aug. 19, 1999).

And that court did not only just five years ago adopt these doctrines as the law of the circuit. See, e.g.; *Nemmers v. USA*, 870 F.2d 426 (7th Cir. 1989); *Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989); *Barrington Press, Inc. v. Morey*, 816 F.2d 341 (7th Cir. 1987); *Soderbeck v. Burnett County, Wis.*, 821 F.2d 446 (7th Cir. 1987).

As *Nemmers* phrased the doctrine of law of the case, every holding in an appellate remand opinion or order becomes the law of the case, and the court will not reconsider the holding "without a showing that either the evidence considered on remand was substantially different, or controlling authority has since changed ..., or the previous decision was 'clearly erroneous, and would work a substantial injustice' [citations omitted]." This Court phrased it similarly in *Agostini v. Felton*, 521 U.S. 203, 236 (1997), an opinion cited often by the Seventh Circuit court of appeals.

A month before it issued its order in Mann's appeals, that court wrote, in *Vidimos, Inc. v. Wysong Laser, supra.*:

> This appeal is founded on a misunderstanding of the doctrine of law of the case.... Wysong has appealed, represented by new counsel who challenge two rulings in our previous opinion that proved decisive in the award of damages and prejudgment interest to the plaintiff on remand.... *But that is the*

> *sort of argument that the law of the case doctrine bars--namely, an argument for reconsideration that is based not on intervening authority, new (and heretofore undiscoverable) evidence, or other changed circumstances that justify waiver of the doctrine*, e.g., [citations omitted], *but on considerations of fact or law that were available when the previous appeal was argued.... The remedy of a losing party who believes that through oversight or impulsiveness the court has erred is to seek rehearing – which Wysong did not do – rather than to lie in wait and then, years later (two and a half years, to be precise), having lost on remand, to present its argument for reconsideration in a second appeal.* [Citations omitted.] [S]uch a litigating strategy ... *will not be allowed to succeed.* [Emphasis added.]

There is no *published opinion* of that court that defies the doctrines of law of the case and waiver, at least not in a manner sufficiently obvious to effectuate an alteration of the law by virtue of the publication of the opinion.

A staple of that court's opinions is an acknowledgement of the reliance that plaintiffs and contingent-fee counsel place upon the application of the doctrines of law of the case and waiver to their own case in calculating the value of pursuing the litigation; e.g., *Carr v. O'Leary, supra.; Vidimos.* The order in Mann's case, on the other hand, ordered her to pay the appellees' costs in the successive appeal that relitigated *de novo* the issues determined in her favor in the initial cross-appeals. (She did not pay the costs, but only because the appellees did not submit a bill of costs.)

Every single member of the *en banc* court, and the senior judge who was a member of the panel in *both sets* of appeals in her case, has during the last five years authored or concurred in a published opinion that enunciates the doctrines of law of the case and waiver of claims and defenses. Yet, although the petition was pending for six weeks, *no* judge

voted to hear the case *en banc*.[3] Not even Chief Judge Richard Posner, who authored *Vidimos, supra.*, *Avitia, supra.*, *People Who Care, supra.*, *Carr v. O'Leary, supra.*, and several of the other similar ones, and who also had authored *Speakers of Sport, Inc. v. ProServ, Inc.*, 98-3113 (7th Cir. May 13, 1999), and *J.D. Edwards & Co. v. Podany*, 168 F.3d 1020 (7th Cir. 1999), both cited below.

Contrast this with the following statement authored by Judge Posner for the *en banc* court in *Newman-Green Inc. v. Alfonzo-Larrain R.*, 854 F.2d 916 (7th Cir. 1987), in which the court vacated a published opinion:

> We vacated the panel decision, and took the case en banc to decide whether a court of appeals is empowered to dismiss a party in order to retain federal jurisdiction. Previous decisions by this court had answered the question "no," but the panel disagreed and held that we may do this, 832 F.2d 417, 419-20 (7th Cir. 1987), and it went on to reverse the district court on the merits. The full court adheres to our previous decisions.

Mann's research has found no *en banc* review by that court of an order issued by virtue of (if not in actual compliance with the rule's own stated prerequisites) that court's Circuit Rule 53, and it appears that there exists an internal court policy that prohibits it from hearing, *en banc*, any appeal that was resolved by unpublished order – a policy premised upon a belief that unpublished resolution of appeals that deviate from universally established law do not actually alter the law and therefore are of no large importance.

It is, in other words, not the law's reality but its facade that matters to the *en banc* court – and the panel in Mann's appeals knew that. The public's ignorance is bliss, not for the public but for the members of the judiciary whose whim or

---

[3] That court's internal operating procedure as published in its handbook and on its Web site allows the judges only 10 days after such a petition is distributed *en banc* in which to request a vote on it. Mann's petition remained pending for six weeks even though no judge requested a vote on it.

convenience is served by the license that Circuit Rule 53 provides them. The panel, in other words, could and did create its own exemption from any possible *en banc* oversight of its ruling and therefore from application of that circuit's law.

Such a policy *itself* fundamentally alters the law by effectively (albeit quietly) dismantling the Equal Protection component of the Fifth Amendment's Due Process Clause and perhaps the Due Process Clause itself. It licenses (and in Mann's case licensed) a brazen failure by the assigned appellate panel to apply the law whenever it is inconvenient for it to do so in a particular case.

Also, during the six-week pendency of her petition for rehearing with suggestion for rehearing *en banc*, Mann submitted several submissions pursuant to F.R.A.P. 28(j). Judge Easterbrook disallowed their filing, issuing orders stating that Rule 28(j) does not apply to such petitions. (See App. P.) But that court did allow three such filings during the pendency of a petition for rehearing with suggestion for rehearing en banc last spring, in *LaGuerre v. Reno* (7th Cir. No. 98-1954), an interpretation of Rule 28(j) that gives effect to its purpose: consistency in application of the law.[4]

D. THE DISTINCTION BETWEEN DAMAGES FOR TORT AND FOR BREACH OF CONTRACT UNDER ILLINOIS LAW

Also in the earlier set of appeals in Mann's case, the defendants had argued that Mann's tort damages were duplicative of the small award she had won on her breach of contract count, an award thoroughly circumscribed by the limits of contract law and by various rulings during the trial, including one that barred her from providing expert testimony about prospective financial injury, rulings that Mann had challenged in that appeal. In remanding the two counts for

---

[4] The panel, or at least its presiding judge, also denied an instanter motion that Mann filed 12 days after the issuance of the July 14, 1999, order for leave to supplement the appendix to her petition with a transcript of oral argument. Mann had filed the petition itself seven days early. See motion, transcript and order at App. Q.

retrial, the court had ruled *against* the defendants on this issue and had reopened the damages issue for the second trial before a different judge.

No matter. Unlike in the other cases, the court's earlier *rejection* of the cross-appellants' earlier assertions was – well, not *quite* short-lived, but three and one-half years long.

The court's amorphous order does not even explain the basis for its single-sentence finding that tort damages for the defamation would be duplicative of the damages for breach of contract, a finding not contained in the district court's orders; it does not even say whether this was intended as a statement of law or, rather, as a finding of fact, either on the basis of a waiver provision it believed was in the contract or upon a calculation by the court of Mann's damages.

The award actually amounted to about one-third of her out-of-pocket expenses to litigate the case.

The court's legal premise, if that is what it is, is patently ridiculous in light of actual Illinois law. See, e.g., *Speakers of Sport, Inc. v. ProServ, Inc.*, No. 98-3113 (7th Cir. May 5, 1999), citing to *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358, 370-71 (Ill. 1998); *J.D. Edwards & Co. v. Podany*, 168 F.3d 1020 (7th Cir. 1999). But Mann is not certain that that is what it is – that is, that the court intended it as a premise of *law*. In *Neal, supra.*, Judge Easterbrook explained elaborately that Illinois law indeed allows for monetary compensation for "special" – i.e., *non-monetary* – injury resulting from the commission of a tort.

Perhaps the court was finding that it is not Illinois tort law, generally, but only Illinois *defamation law* that allows monetary recovery only for specifically proved dollar-for-dollar monetary loss. If so, the finding marks an epiphany for Judge Bauer. He had authored a lengthy opinion affirming a jury's $2 million judgment against the CBS network and a Chicago newscast anchor because, he explained, Illinois law allows substantial monetary tort damages for injury to business reputation *even absent tangible monetary loss*, as was the situation in that case. See *Brown & Williamson v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987).

E. THE PARAMETERS OF FIRST AMENDMENT PROTECTION FOR DEFAMATION

Nor does the court's order explain its finding that Barnard's "silence speaks a mouthful" comment, which cost Mann the job she was offered as an assistant United States trustee in bankruptcy, was "obviously" capable of innocent construction and therefore is not actionable in tort, a ruling not contained in the district court's orders. The order does not even state the obviously innocent construction. It may be obvious, but not to Mann, nor to Barnard, nor to the attorney to whom the statement was made, nor to anyone to whom it was reported.

Nor does it explain why, if the defense was so obviously available, *it was not raised until after remand for retrial twelve and one-half years after the lawsuit was filed.*

Nor does the order attempt to reconcile its statement of defamation law with that of *Milkovich v. Lorain Journal,* 497 U.S. 1 (1990). The order does not mention *Milkovich*, and ostensibly relies for its premise of law entirely upon an Illinois Supreme Court opinion, *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 607 N.E.2d 201 (Ill. 1992). But *Kolegas* expressly based *its* ruling for the *plaintiff* upon *Milkovich. Milkovich* states the breadth of First Amendment protection as "whether a reasonable factfinder could conclude that the statements ... imply [a defamatory assertion]," not whether the statements are *capable* of an innocent construction.

Kolegas was issued more than three years before the *first* set of appeals was resolved in Mann's case, and *she* cited it and *Milkovich* back then.

II. FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION, AND THE SEVENTH AMENDMENT RIGHT TO JURY DETERMINATION OF FACT

Last, but certainly as it effects her personally, not least, Mann also asks this Court to consider whether a state statute found to mandate a judicial finding of *fact* in specific cases

violates the Fourteenth Amendment's due process clause and the Seventh Amendment's guarantee of *jury* determination of facts in lawsuits brought under the common law. Particularly, she asks this Court to consider the constitutionality of a statutorily imposed imprimatur by the court upon the accuracy or good faith of defamatory statements that have the inherent potential to destroy their victim's livelihood.

The appellate court, torturing the Illinois Supreme Court's opinion in *Harinek v. 161 North Clark St. Ltd. Partnership*, 181 Ill. 2d 335, 692 N.E.2d 1177 (Ill. 1998), found such a statutory mandate in Illinois' Tort Immunity Act, but it did not consider *the constitutionality* of that mandate. The mandated findings of fact, however, have profound implications for Mann. Because issues of state of mind, e.g., objectivity, motive, are virtually always considered issues for the trier of fact – a concept of law that even most lay adults know – any reader of the appellate court's order surely will interpret it as stating substantive findings of fact about Mann discerned from the evidentiary record. A day before Mann's Petition for Rehearing with Suggestion for Rehearing *en banc* was denied, that court, in *Wollin v. Gondert*, No. 98-1857 (7th Cir. Sep. 2, 1999), said "an objective immunity analysis at the summary judgment stage prior to discovery does not include an evaluation of intent. *This is because evaluating intent would be a factual analysis*...." [Emphasis added.] See, also, Judge Easterbrook opinion, Judge Ripple concurring, in *Walker v. Nat'l Recovery, Inc.*, 99-2119 (7th Cir. Dec. 21, 1999), finding question of mental state an issue of fact, "not of law or logic."

The credibility of defenses to wrongful-discharge allegations and the accuracy of defamatory statements and the good faith, or lack of it, of the publishers of defamation are, in every state in this county and in federal law (e.g., whistleblower statutes; Title VII of 42 U.S.C. 2000e *et seq.*,) considered issues of fact, thus any reader of conclusory statements of fact by a court will presume that the court's determination was based upon a review of the evidentiary record. Yet in this case, the appellate court found not only a statutory

bar to legal redress for what can be a deliberate and deliberately devastating injury but also a statutory *invitation to commit the injury* if it is personally advantageous to do so. The statute *requires the court to resolve issues of fact in favor of defendants*, the court said.

This is (suffice it to say) a remarkable reach for a governmental immunity statute. It also constitutes a stark denial of the Fourteen Amendment's guarantee of due process of law at its most fundamental, particularly when those findings of fact read as *ad homonym* attacks upon the plaintiff. See *Albright v Oliver, supra.* And it operates as a denial of the Seventh Amendment's right to jury determination of facts in lawsuits brought under the common law.

Mann has never heard of a presumption of *fact* by operation of liability-immunity statute, and she doubts that anyone else but the members of that court has either. Certainly this is a novel construct of *Illinois* law; there is no published opinion of any Illinois court that finds such a presumption of *fact* by operation of that statute, or by operation of any other statute, best as Mann can tell.

Mann had argued extensively on appeal that the defendants' conduct constituted a denial of the type of substantive due process rights described by this Court in *County of Sacramento, supra.*, particularly given the suddenly recognized statutory immunity that eliminated consideration of *Parratt v. Taylor*, 451 U.S. 527 (1981); the first several sections of her opening appellate brief addressed this issue. Yet the court declined even to mention it. But seven months earlier, in *Payne v. Churchich*, 161 F.3d 1030 (7th Cir. 1998), Judge Ripple, in an opinion reversing the dismissal of a federal civil rights count that was granted "on the ground that [the defendants] enjoyed absolute immunity as a matter of state law under the Illinois Tort Immunity Act," wrote:

> Immunity on the federal claims, those brought pursuant to 42 U.S.C. sec. 1983 in this case, is a matter of federal law.... In the case before us ... the district court failed to consider whether the governmental defendants were liable or immune under federal law

> for their alleged federal constitutional violations. Therefore we cannot accept the district court's rationale for dismissing the claims....

The panel in Mann's appeals, by its default of discussion, did *exactly* what seven months earlier one of its members and two colleagues had reversed a district judge for doing: resolving a *federal* civil-rights substantive due process count by applying *state* statutory tort immunity. Elsewhere in *Churchich*, the panel had discussed the significant alteration in due process analysis mandated by *County of Sacramento*.

This issue is particularly significant given the court's idiosyncratic interpretation of *Stratman v. Brent, supra.* In contriving a distinction between *Stratman* and Mann's case, the court found *Stratman* to hold the immunity statute inapplicable only to the publication of defamatory statements *not contained in the plaintiff's personnel file*; to trigger the statutory immunity, the court's order suggests, the defendant in *Stratman* need only have first reduced the defamatory statements to writing and placed the writing into Stratman's employment record – a potently dangerous construct of law.

In December, 1999, Mann filed respective complaints pursuant to 28 U.S.C. § 372(c) against Judges Moran, Andersen and Easterbrook for their conduct as described above (and, against Judge Easterbrook for additional conduct). (App. Q.) Seventh Circuit Chief Judge Posner, on December 22, dismissed all of them as "directly related to the merits of a decision or procedural ruling," and stating that judicial misconduct, including conflict of interest, is mere "error" and thus is beyond the scope of that statute. (App. R.)

CONCLUSION

Judge Easterbrook, in reiterating a circuit rule that requires district judges to state their reasons whenever the judge "resolves any claim or counterclaim on the merits [or] terminates the litigation in its court," wrote, in *U.S. v. Mobley*, No. 99-1621 (7th Cir. Sept. 30, 1999), "Reasons are essential

to intelligent appellate review .... Giving reasons also contributes to intellectual discipline...." He illustrated:

> The decision concerning para. 23 was an easily preventable gaffe.... Because the district judge did not explain his decision, we can't tell whether he meant to delete a portion of a count, a step appealable under [citation omitted], or instead to foreclose mention of overt acts that occurred before 1993."

The judge's exemption of himself and his immediate colleagues from compliance with this dictate of logic seems to Mann the ultimate conceit -- and the ultimate acknowledgment that Mann indeed was denied procedural and perhaps substantive due process of law in her appeals. Had these judges exercised the intellectual discipline that they enforce upon district judges within their circuit, they might have recognized issues on Mann's laundry list that indeed were worthy of their discussion. There is a lot of dirty laundry in this litigation.

Mann spoke recently with this Court's chief deputy clerk, Francis Lorson, about the application of the Court's Rule 10(a) in actual practice, specifically whether the Court ever actually does grant certiorari petitions in civil cases upon the basis that "a United States court of appeals has ... so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." He said it does, but declined to offer ballpark statistics.

But if not in this case, then in what case? Mann asks this court to grant this Petition.

Respectfully submitted,

Beverly Mann
Petitioner *Pro se*